

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KATHRYN NURRE,

Plaintiff,

v.

DR. CAROL WHITEHEAD, in her individual  
and official capacity as the Superintendent of  
Everett School District No. 2,

Defendant.

No. C06-901RSL

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFF'S CROSS-MOTION FOR  
SUMMARY JUDGMENT

**I. INTRODUCTION**

This matter comes before the Court on "Defendant's Motion for Summary Judgment" (Dkt. #8) (hereinafter "Motion") and "Plaintiff Nurre's Motion for Summary Judgment Under CR 56(A)" (Dkt. #17) (hereinafter "Cross-Motion"). In June of 2006, the Henry A. Jackson High School ("JHS") Wind Ensemble was not allowed to perform Franz Biebl's instrumental arrangement of "Ave Maria" at the 2006 JHS graduation ceremony in Everett, Washington. Plaintiff commenced this action claiming that defendant violated plaintiff's rights under the Free Speech, Establishment, and Equal Protection Clauses of the United States Constitution by prohibiting the performance of "Ave Maria." For the reasons set forth below, the Court grants

ORDER GRANTING DEFENDANT'S  
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1 defendant's Motion and denies plaintiff's Cross-Motion.<sup>1</sup>

## 2 II. DISCUSSION

### 3 A. Background

4 In June of 2006, plaintiff was a senior at JHS, which is operated and controlled by Everett  
5 School District No. 2 (hereinafter the "School District"). See Dkt. #18 (Nurre Decl.) at ¶¶3-5<sup>2</sup>;  
6 Dkt. #5 at ¶4. During plaintiff's senior year, and for the two prior school years, plaintiff was a  
7 member of the JHS Wind Ensemble (hereinafter "Wind Ensemble"). See Dkt. #18 at ¶7. As in  
8 previous years, the Wind Ensemble was selected to perform at the 2006 JHS graduation  
9 ceremony. Id. at ¶10. From at least 2002, the Wind Ensemble's graduating seniors selected an  
10 instrumental piece that the Wind Ensemble performed at graduation. See Dkt. #9, Ex. 3 (Moffat  
11 Dep.) at 17:4-15. In 2003-2005, the Wind Ensemble's seniors selected "On a Hymnsong of  
12 Phillip Bliss," which was played at graduation. Id. at 31-33. In May 2006, the Wind  
13 Ensemble's seniors unanimously selected a different song to play at graduation: an instrumental  
14 piece titled "Ave Maria"<sup>3</sup> composed by Franz Biebl. Id. at 35; Dkt. #18 at ¶¶12-16. The Wind  
15 Ensemble had previously played Franz Biebl's "Ave Maria" at a school music concert. See Dkt.

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17 <sup>1</sup> Neither party requested oral argument under Local Civil Rule 7(b)(4). Accordingly, the Court  
18 decides this matter on the memoranda, declarations, and exhibits submitted by the parties.

19 <sup>2</sup> The Court denies defendant's motion to strike plaintiff Nurre's declaration given the  
20 representation that plaintiff physically signed her declaration when it was filed on April 24, 2007. See  
21 Dkt. #27 n.3 (motion to strike); Dkt. #30 (Supplemental Declaration) at ¶¶2-3 (declaring that plaintiff  
physically signed her declaration when it was filed).

22 <sup>3</sup> Under Fed. R. Evid. 201, the Court takes judicial notice that "Ave Maria" means "Hail Mary."  
23 See Webster's II New Riverside University Dictionary 141 (1984) (defining "Ave Maria" as "The Hail  
24 Mary."); Webster's Third New International Dictionary 150 (1981) (unabridged) (defining "ave maria" as  
25 "1. a salutation to the Virgin Mary combined as now used in the Roman Catholic Church with a prayer to  
her as mother of God."); Dkt. #9, Ex. 1 (Nurre Dep.) at 35:22-36:6; Dkt. #9 at Ex. 3 (Moffat Dep.) at  
59:22-24.

1 #19, Ex. A (Moffat Dep.) at 36:14-23.

2 After the selection of “Ave Maria,” the Wind Ensemble’s director, Lesley Moffat sent  
3 copies of the music to be performed at graduation, including Biebl’s “Ave Maria,” to JHS’s  
4 Principal, Terry Cheshire, and to the School District’s Associate Superintendent for Instruction,  
5 Karst Brandsma. See Dkt. #9, Ex. 3 (Moffat Dep.) at Dep. Ex. 5. Principal Cheshire forwarded  
6 this information to Lynn Evans, the School District’s Executive Director of Instruction and  
7 Curriculum. See Dkt. #12 (Cheshire Decl.) at ¶3. Ms. Evans, in turn, took the Wind  
8 Ensemble’s selection of “Ave Maria” to her supervisor, Ms. Brandsma. See Dkt. #11 (Evans  
9 Decl.) at ¶3. Thereafter, defendant Whitehead called a meeting with Ms. Brandsma and Ms.  
10 Evans to discuss the Wind Ensemble’s selection of “Ave Maria.” See Dkt. #9, Ex. 2 (Whitehead  
11 Dep.) at 75:24-77:2. At this meeting, the decision was made to “deny the request from the  
12 students and the band teacher to play Ave Maria at the commencement.” Id. at 77:13-15.

13 Ms. Moffat was informed of this decision when she received a copy of an e-mail from  
14 Ms. Brandsma “requesting that music selections for graduation be entirely secular in nature.”  
15 See Dkt. #19, Ex. A (Moffat Dep.) at 38-39; Dep. Ex. 4 (emphasis in original). Ms. Moffat then  
16 had a conversation with Principal Cheshire where Ms. Moffat asked whether it would be  
17 permissible to change the name of the song or list the name of the song differently in the  
18 program. See Dkt. #12 (Cheshire Decl.) at ¶4. Principal Cheshire responded to this request by  
19 stating that “it would be unethical to inaccurately or untruthfully list the titles to pieces.” Id.;  
20 Dkt. #9, Ex. 3 (Moffat Dep.) at 40-41. Based on this decision, Ms. Moffat informed the Wind  
21 Ensemble that they needed to select a different piece of music to play at graduation. See Dkt.  
22 #9, Ex. 3 (Moffat Dep.) at 41:15-42:5. Ultimately, the Wind Ensemble’s seniors selected the  
23 fourth movement of the “Holst Second Suite in F,” which was played at the JHS graduation on  
24 June 17, 2006. See id. at 42; Dkt. #10, Ex. 6 (2006 JHS graduation program listing the  
25 performance of Gustav Holst’s “Second Suite for Military Band”).

**B. Analysis**

This matter comes before the Court on cross-motions for summary judgment on claims arising under 28 U.S.C. § 1983. Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A § 1983 claimant must prove “two essential elements: 1) that the Defendants acted under color of state law; and 2) that the Defendants caused [plaintiff] to be deprived of a right secured by the Constitution and the laws of the United States.” Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997); 42 U.S.C. § 1983. In her answer, defendant admits that she was acting under the color of the law of the State of Washington. See Dkt. #5 (Answer) at ¶4; Dkt. #1 (Complaint) at ¶4. Accordingly, the Court need only determine whether defendant deprived plaintiff of a constitutional right.<sup>4</sup>

**1. Claim for declaratory relief**

As an initial matter, in her motion, defendant requests dismissal of plaintiff’s claim for declaratory relief<sup>5</sup> as moot because plaintiff has graduated and will never again participate in an Everett School District graduation ceremony. See Motion at 11. The Court agrees. Now that plaintiff has graduated, her claims for declaratory relief are dismissed as MOOT. See Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1099 (9th Cir. 2000) (“[A] student’s graduation

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<sup>4</sup> The Court also notes for the record that defendant “acknowledges Everett School District does not possess Eleventh Amendment immunity.” See Motion at 13.

<sup>5</sup> Although not expressly identified as a claim for declaratory relief, the Court construes paragraph A in plaintiff’s prayer for relief in the Complaint as a request for declaratory relief. See Dkt. #1 (Complaint) at 9, ¶A (requesting “that judgment be entered finding and concluding that the Defendant’s refusal to allow the Plaintiff and the other senior members of the high school wind ensemble to perform Biebl’s ‘Ave Maria’ at the June 17, 2006 graduation ceremony for Henry M. Jackson High School deprived the Plaintiff of her rights under the First and Fourteenth Amendments to the United States Constitution[.]”).

moots his claims for declaratory and injunctive relief against school officials”); Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 798 (9th Cir. 1999) (“[T]he student-plaintiff already has suffered any injury that would result from the alleged forced participation in prayers that were part of the student-plaintiff’s graduation ceremony. Because we cannot remedy the student-plaintiff’s injury with injunctive or declaratory relief, the student-plaintiff’s claims for those forms of relief are moot.”). This issue, however, is not dispositive in this case because plaintiff’s claims for damages remain. See Dkt. #1 at 9, ¶B; Doe, 177 F.3d at 798 (“A student’s graduation moots claims for declaratory and injunctive relief, but it does not moot claims for monetary damages”). Therefore, the Court will review the merits of plaintiff’s constitutional claims in light of the requested relief for damages.

## **2. Qualified immunity for defendant as an individual<sup>6</sup>**

Defendant claims she is immune from suit based on qualified immunity. See Motion at 11. The Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. See Saucier v. Katz, 533 U.S. 194, 200 (2001) (“Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings[.]”). Although “[q]ualified immunity shields public officials from money damages only,” defendant’s qualified immunity defense may resolve all the remaining claims in this action given the Court’s ruling above that plaintiff’s request for declaratory relief is moot. Morse v. Frederick, 127 S. Ct. 2618, 2624 n.1 (2007) (“In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief. Justice Breyer’s proposed decision on qualified immunity grounds would dispose of the damages claims, but Frederick’s other claims would remain unaddressed.”) (internal citation omitted). For these reasons, the Court turns first

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<sup>6</sup> The Court considers plaintiff’s claims against the School District separately in Section II.B.3, below.

1 to defendant's qualified immunity defense.

2 In reviewing a qualified immunity defense on a motion for summary judgment, the Court  
 3 is "required to view all facts and draw all reasonable inferences in favor of the nonmoving  
 4 party." Brosseau v. Haugen, 543 U.S. 194, 195 n.2 (2004) (per curium); see also Motley v.  
 5 Parks, 432 F.3d 1072, 1075 n.1 (9th Cir. 2005) (en banc) (accepting plaintiffs' recitation of the  
 6 facts because the case arose in the posture of a motion for summary judgment and involved  
 7 issues of qualified immunity). The Supreme Court in Saucier established a two-part test to  
 8 resolve claims of qualified immunity. Saucier, 533 U.S. at 201. In ruling on a qualified  
 9 immunity defense, "the first inquiry must be whether a constitutional right would have been  
 10 violated on the facts alleged; second, assuming the violation is established, the question whether  
 11 the right was clearly established must be considered[.]" Id. at 200; Cole, 228 F.3d 1101. The  
 12 two parts of this test are discussed, in the order required by Saucier, below.<sup>7</sup>

13 **a. Was a constitutional right violated?**

14 In this case, plaintiff alleges violations of three distinct constitutional rights under: (1)  
 15 the First Amendment's Free Speech Clause; (2) the First Amendment's Establishment Clause;  
 16 and (3) the Fourteenth Amendment's Equal Protection Clause. See Dkt. #1 at 6-9. For clarity,  
 17 the Court separately considers defendant's qualified immunity defense as applied to these three  
 18 constitutional claims.

19 **(i). Free Speech**

20 The threshold issue in determining whether plaintiff's free speech rights were violated by  
 21 defendant's prohibition of the performance of Franz Biebl's "Ave Maria" is whether this piece  
 22 of music is protected "speech" under the Free Speech Clause of the First Amendment, made  
 23 \_\_\_\_\_

24 <sup>7</sup> See Brosseau, 543 U.S. at 201 (Breyer, J., concurring) ("Saucier requires lower courts to  
 25 decide (1) the constitutional question prior to deciding (2) the qualified immunity question."); accord  
 26 Scott v. Harris, 127 S. Ct. 1769, 1774 n.4 (2007).

1 applicable to the states by the Fourteenth Amendment. See U.S. Const. amend I (“Congress  
 2 shall make no law . . . abridging the freedom of speech[.]”); Lamb’s Chapel v. Ctr. Moriches  
 3 Union Free Sch. Dist., 508 U.S. 384, 387 (1993). Defendant contends that Franz Biebl’s  
 4 instrumental version of “Ave Maria” is not “speech” because plaintiff has not shown that “[a]n  
 5 intent to convey a particularized message was present, and [that] the likelihood was great that  
 6 the message would be understood by those who viewed it.” See Dkt. #27 at 6 (quoting Texas v.  
 7 Johnson, 491 U.S. 397, 404 (1989)).

8 In Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989), the Supreme Court held that  
 9 music is protected “speech” under the First Amendment:

10 Music is one of the oldest forms of human expression. From Plato’s discourse in  
 11 the Republic to the totalitarian state in our own times, rulers have known its  
 12 capacity to appeal to the intellect and to the emotions, and have censored musical  
 13 compositions to serve the needs of the state. . . . The Constitution prohibits any  
 14 like attempts in our own legal order. Music, as a form of expression and  
 15 communication, is protected under the First Amendment. In the case before us the  
 performances apparently consisted of remarks by speakers, as well as rock music,  
 but the case has been presented as one in which the constitutional challenge is to  
 the city’s regulation of the musical aspects of the concert; and, based on the  
 principle we have stated, the city’s guideline must meet the demands of the First  
 Amendment.

16 Id. at 790 (emphasis added, internal citation omitted). While neither the Supreme Court nor the  
 17 Ninth Circuit has expressly held that instrumental music of the type involved<sup>8</sup> in this case is  
 18 “speech,” other courts have held that instrumental music falls within the First Amendment’s  
 19 purview.<sup>9</sup>

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21 <sup>8</sup> Plaintiff asserts that the title of the song, “Ave Maria,” which would have been printed in the  
 22 graduation program, is not the speech at issue. Instead, plaintiff contends that the speech at issue is only  
 23 the “performance of Biebl’s beautiful music.” See Dkt. #29 (Reply to Cross-Motion) at 4 (“The  
 24 expression at issue here is not the words ‘Ave Maria’ printed in the program, but the performance of  
 Biebl’s beautiful music.”).

25 <sup>9</sup> Legal scholarship appears to be silent on this specific issue. See, e.g., Peter Meijes Tiersma,  
 26 Article: Nonverbal Communication and the Freedom of “Speech,” 1993 Wis. L. Rev. 1525, 1531 (1993)

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For example, Judge Posner, when analyzing the passage from Ward cited above, stated: “The rock music in question [from Ward] had lyrics. But the Court’s reference in the second sentence to music’s appeal to the emotions, and its citation (omitted from the quotation [above]) to an article about Soviet ambivalence toward Stravinsky – a composer primarily of nonvocal music – make it implausible to suppose that the Court thought it was speaking only of vocal music; and it did not say it was. . . . This court [the Seventh Circuit] has held that wordless music is speech with the meaning of the [First] [A]mendment.” Miller v. Civil City of S. Bend, 904 F.2d 1081, 1096 (7th Cir. 1990) (Posner, J., concurring) (citing Reed v. Village of Shorewood, 704 F.2d 943, 950 (7th Cir. 1983) (“[Defendants] would be infringing a First Amendment right . . . even if the music had no political message – even if it had no words – and the defendants would have to produce a strong justification for thus repressing a form of ‘speech.’”) (emphasis added); see also Bernstein v. United States Dep’t of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996) (“Music . . . is speech protected under the First Amendment.”). The Fifth Circuit has also concluded that instrumental music is covered by the First Amendment: “‘Speech,’ as we have come to understand that word when used in our First Amendment jurisprudence, extends to many activities that are by their very nature non-verbal: an artist’s canvas, a musician’s instrumental composition, and a protester’s silent picket of an offending entity are all examples of protected, non-verbal ‘speech.’” Steadman v. Texas Rangers, 179 F.3d 360, 367 (5th Cir. 1999) (emphasis added).

Finally, Supreme Court dictum indicates that instrumental compositions, like the dodecaphonic music of Arnold Schoenberg, qualify for First Amendment protection. See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (“[A]

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(“The communicative value of painting, sculpture, dancing, or instrumental music raises issues of aesthetic theory that I leave to those more competent in this area.”).



1 narrow, succinctly articulable message is not a condition of constitutional protection, which if  
 2 confined to expressions conveying a ‘particularized message,’ would never reach the  
 3 unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or  
 4 Jaberwocky verse of Lewis Carroll.”) (emphasis added, internal citation omitted).

5 Based on this persuasive authority, the Court concludes that the Wind Ensemble’s  
 6 instrumental performance of Franz Biebl’s “Ave Maria,” constitutes “speech” under the First  
 7 Amendment. Accordingly, the Court turns next to the issue of whether defendant’s prohibition  
 8 of this music at the JHS graduation ceremony violated plaintiff’s free speech rights.

9 Both parties assert that in determining the First Amendment’s reach in this case, the  
 10 Court should look to the forum where the speech is presented.<sup>10</sup> A forum analysis is used as a  
 11 “means of determining when the Government’s interest in limiting the use of its property to its  
 12 intended purpose outweighs the interest of those wishing to use the property for other purposes.”  
 13 Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). In this case,  
 14 the forum analysis is applicable even though the graduation ceremony was held “off campus” at  
 15 the Everett Events Center. See Sumnum v. Duchesne City, 482 F.3d 1263, 1270 (10th Cir.  
 16 2007) (“[A] First Amendment forum analysis may apply even when the government does not  
 17 own the property at issue[.]”); Dkt. #10 at ¶3 (“Though the Everett School District does not own  
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19 <sup>10</sup> Although the Court considers the parties’ forum analysis assertions, as the Court discusses in  
 20 Section II.B.2.b below, based on Ninth Circuit authority, a forum analysis is not required to determine the  
 21 viability of an Establishment Clause defense where the speech at issue bears the imprimatur of the school.  
 22 See Cole, 228 F.3d at 1101 (“We conclude the District officials did not violate the students’ freedom of  
 23 speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the  
 24 District’s refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation  
 25 was necessary to avoid violating the Establishment Clause[.]”); Lassonde v. Pleasanton Unified Sch.  
 26 Dist., 167 F. Supp. 2d 1108, 1112 n.4 (“Plaintiff and Defendants both devoted a significant amount of  
 briefing to whether the Amador Valley High School graduation was a nonpublic or limited public forum.  
 However, because the Ninth Circuit’s controlling decision in Cole did not depend on the type of forum,  
 this Court need not decide that question.”), aff’d, 320 F.3d 979 (9th Cir. 2003).

1 the Everett Events Center, it rents the facility and does sponsor and fund the graduation  
 2 ceremony[.]”); id. at Ex. 6 (2006 JHS graduation program).

3 The forum inquiry “divides government property into three categories: public fora,  
 4 designated public fora, and nonpublic fora.” Children of the Rosary v. City of Phoenix, 154  
 5 F.3d 972, 976 (9th Cir. 1998). A “pubic forum” is a place, such as a sidewalk or a park, that has  
 6 been traditionally open for public expression. DiLoretto v. Downey Unified Sch. Dist. Bd. of  
 7 Educ., 196 F.3d 958, 964 (9th Cir. 1999). A “designated public forum” is created when the  
 8 government intentionally opens a nontraditional form to public discourse. Id. All remaining  
 9 public property is characterized as nonpublic fora. Id. at 965. The Supreme Court has also  
 10 “identified another category – the ‘limited public forum’ – to describe a nonpublic forum that  
 11 the government intentionally has opened to certain groups or for the discussion of certain  
 12 topics.” Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 908 (9th Cir. 2007),  
 13 petition for cert. filed (U.S. Jun. 7, 2007) (No. 06-1633).

14 Where a forum is “public,” such as a traditional or designated public forum, the ability of  
 15 the government to limit speech is “sharply circumscribed.” Id. at 907. “Content-based  
 16 regulation is justified only when ‘necessary to serve a compelling state interest and [when] it is  
 17 narrowly drawn to achieve that end,’” and “[c]ontent-neutral restrictions that regulate the time,  
 18 place, and manner of speech are permissible so long as they are ‘narrowly tailored to serve a  
 19 significant government interest, and [they] leave open ample alternative channels of  
 20 communication.’” Id. (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37,  
 21 45 (1983)). Speech in a nonpublic forum, however, is subject to less demanding scrutiny, “[t]he  
 22 challenged regulation need only be reasonable, as long as the regulation is not an effort to  
 23 suppress the speaker’s activity due to disagreement with the speaker’s view.” Int’l Soc. for  
 24 Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992). Limitations on speech in a  
 25 “limited-public forum” are subject to a separate test: “[r]estrictions governing access to a

1 limited public forum are permitted so long as they are viewpoint neutral and reasonable in light  
2 of the purpose served by the forum.” Glover, 480 F.3d at 908.

3 In this case, defendant asserts that JHS’s graduation ceremony was a nonpublic forum  
4 because “parameters limited what music the wind ensemble could play.” See Dkt. #32 at 4;  
5 Motion at 17. In contrast, plaintiff asserts that the forum at issue is a “limited public forum.”  
6 See Dkt. #25 at 10. In making this assertion, plaintiff claims that the relevant forum for analysis  
7 is not the entirety of the graduation ceremony, but rather “the Wind Ensemble performance  
8 during the ceremony,”<sup>11</sup> and further contends that the forum question in this case involves a  
9 disputed factual issue because “[a] reasonable trier of fact could conclude that the School  
10 District opened the relevant forum for expression by a particular group, i.e., the Wind Ensemble  
11 seniors, and thereby created a limited public forum.” See id. at 9-10. On defendant’s motion for  
12 summary judgment based on qualified immunity, the Court is “required to view all facts and  
13 draw all reasonable inferences in favor of the nonmoving party.” Brosseau, 543 U.S. at 195 n.2.  
14 Under this standard, in drawing all reasonable inferences in plaintiff’s favor, the Court  
15 concludes that for purposes of summary judgment there are sufficient facts showing that the  
16 School District created a limited public forum when it allowed the Wind Ensemble’s seniors to  
17 choose the piece for performance at the JHS 2006 graduation.<sup>12</sup> See Dkt. #9, Ex. 3 (Moffat  
18 Dep.) at 17:4-7 (“Q. Does the Jackson High School wind ensemble have a tradition of having  
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21 <sup>11</sup> Modern forum jurisprudence reaches the Wind Ensemble’s temporal performance of “Ave  
22 Maria.” See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) (“The SAF  
23 [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the  
24 same principles are applicable.”).

25 <sup>12</sup> In any event, in the reply filed in support of her Motion, defendant acquiesces to the Court’s  
26 determination of this dispute under the “limited public forum” standard. See Dkt. #32 at 4 (“But  
27 regardless of whether this Court finds Jackson’s graduation ceremony to be a nonpublic forum or a  
28 limited public forum, the distinction is without consequence.”).

1 the seniors choose a final piece for the graduation. A. Yes.”); Dkt. #18 (Nurre Decl.) at ¶11  
2 (“Part of this traditional [graduation] performance by the Wind Ensemble included having the  
3 graduating seniors choose an instrumental piece to be performed at their graduation  
4 ceremonies.”).

5 But, even if the Wind Ensemble’s performance constitutes a “limited public forum,”  
6 defendant’s prohibition on the performance of “Ave Maria” is not a violation of plaintiff’s free  
7 speech rights if the restriction is viewpoint neutral and reasonable in light of the purpose of the  
8 forum. Glover, 480 F.3d at 908. In determining whether the restriction is viewpoint neutral, the  
9 Court must identify whether exclusion of “Ave Maria” is “content discrimination, which may be  
10 permissible if it preserves the purpose of [the] limited forum, [or] viewpoint discrimination,  
11 which is presumed impermissible when directed against speech otherwise within the forum’s  
12 limitations.” Id. at 911 (quoting Rosenberger, 515 U.S. at 829-30).

13 “Content discrimination occurs when the government chooses the subjects that may be  
14 discussed, while viewpoint discrimination occurs when the government prohibits speech by  
15 particular speakers, thereby suppressing a particular view about a subject.” Giebel v. Sylvester,  
16 244 F.3d 1182, 1188 (9th Cir. 2001) (internal quotation marks omitted). The Ninth Circuit has  
17 noted that the “distinction between regulation on the basis of subject matter or viewpoint,  
18 however, ‘is not a precise one.’” Glover, 480 F.3d at 912 (quoting Rosenberger, 515 U.S. at  
19 831). In drawing the distinction between content and viewpoint restrictions, the Ninth Circuit  
20 has held that the “test is whether the government has excluded perspectives on a subject matter  
21 otherwise permitted by the forum.” Id. (emphasis added).

22 In this case, the Court finds that exclusion of “Ave Maria” was based on permissible  
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1 content restriction, not impermissible viewpoint discrimination.<sup>13</sup> The prohibition of the  
 2 performance of “Ave Maria” was based on a decision to keep religion out of graduation as a  
 3 whole, not to discriminate against a specific religious sect or creed. Ms. Brandsma’s e-mail sent  
 4 to the School District’s principals illustrates this point:

5 I am requesting that music selections for graduation be entirely secular in nature.  
 6 My rationale is based on the nature of the event. It is a commencement program in  
 7 celebration of senior students earning their high school diploma. It is not a music  
 8 concert. Musical selections should add to the celebration and should not be a  
 9 separate event. Invited guests of graduates are a captive audience. I understand  
 that attendance maybe [sic] voluntary, but I believe that few students (and their  
 invited guests) would want to miss the culminating event of their academic career.  
 And lastly there is insufficient time at graduation to balance comparable artistic  
 works.

10 See Dkt. #10 (Brandsma Decl.) Ex. 7 (emphasis in original).<sup>14</sup> As Ms. Brandsma explained in  
 11 her declaration, the purpose of this June 2, 2006 e-mail was to “remind them [the District  
 12 principals] that all pieces for graduation should be secular, providing additional information why  
 13 religion had to [be] kept out of graduation.” Id. (Brandsma Decl.) at ¶6. This understanding is  
 14 further reinforced by defendant’s deposition testimony, where she stated: “[W]e made the  
 15 decision that because the title of the piece would be on the program and it’s Ave Maria and that  
 16 many people would see that as religious in nature, that we would ask the band to select  
 17 something different.” Dkt. #9, Ex. 2 (Whitehead Dep.) at 76:23-77:2 (emphasis added).

18 The case would be different if the exclusion had been based on excluding a particular  
 19 religious sect or creed. However, the Court finds that the blanket restriction on the exclusion of  
 20 religious music that occurred in this case is one based on content, not viewpoint. See Glover,

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21  
 22 <sup>13</sup> Even if the restriction was not viewpoint neutral, as explained below in Section II.B.2.b, it was  
 23 not clearly established that defendant’s interest in avoiding an Establishment Clause violation in the  
 context of this case was a knowing violation of the law.

24 <sup>14</sup> Although the e-mail does not reference the performance of “Ave Maria,” plaintiff concedes that  
 25 this e-mail was in direct reference to the Wind Ensemble’s selection of “Ave Maria.” See Dkt. #25 at 11  
 n.3.

1 480 F.3d at 915 (“If the County had, for example, excluded from its forum religious worship  
 2 services by Mennonites, then we would conclude that the County had engaged in unlawful  
 3 viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious  
 4 worship services from the forum is one based on the content of speech.”); cf. Rosenberg, 515  
 5 U.S. at 831 (“By the very terms of the SAF prohibition, the University does not exclude religion  
 6 as a subject matter, but selects for disfavored treatment those student journalistic efforts with  
 7 religious editorial viewpoints.”).<sup>15</sup>

8 The Court also finds, as discussed below in the context of an “Establishment Clause  
 9 defense,” that the prohibition on the performance of “Ave Maria” was reasonable in light of the  
 10 purposes of the 2006 JHS graduation ceremony.<sup>16</sup> See Section II.B.2.b, infra. As a result, under  
 11 the forum analysis, the Court concludes that defendant’s restriction was viewpoint neutral and  
 12 reasonable. Accordingly, defendant did not violate plaintiff’s rights under the Free Speech  
 13 Clause of the First Amendment by prohibiting the performance of “Ave Maria” at the 2006 JHS  
 14 graduation ceremony.<sup>17</sup>

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 16 <sup>15</sup> Plaintiff’s case is further weakened in this regard by the fact that she appears to have no  
 17 religious viewpoint on the performance of “Ave Maria.” See Section II.B.2.a.(ii), infra.

18 <sup>16</sup> Although the forum at issue is that portion of the 2006 graduation ceremony pertaining to the  
 19 Wind Ensemble’s performance, examining the graduation ceremony as a whole is relevant in evaluating  
 20 the reasonableness of defendant’s action in denying the performance of “Ave Maria.” See, e.g., Glover,  
 21 480 F.3d at 910 (“Although the actual forum is a library meeting room, the nature and function of the  
 22 County’s public library as a whole is relevant in evaluating the reasonableness of the County’s  
 23 exclusions.”).

24 <sup>17</sup> The Court finds that the policies and procedures adopted by the School District are not  
 25 controlling in this matter because they do not expressly address the issue of permitted musical  
 26 performances at graduation. See Dkt. #10, Exs. 1-4. Section I of Procedure 2340P, for example, refers  
 to the use of “religious music or literature” at “choral or musical assemblies,” not specifically at  
 graduation. Id., Ex. 2 at 2. The only policy or procedure expressly addressing graduation states:  
 “Neither the District nor individual schools shall conduct or sanction invocations, benedictions or prayer  
 at any school activities including graduation.” Id. at 3.

(ii). Establishment Clause

In her Complaint, plaintiff claims that defendant's "decision to forbid the Plaintiff and other senior members of the high school wind ensemble from performing Biebl's 'Ave Maria' demonstrated a hostility to and bias against religion in violation of the Establishment Clause of the First Amendment to the United States Constitution." See Dkt. #1 at ¶27.<sup>18</sup> "Notwithstanding its 'checkered career,' Lemon v. Kurtzman, 403 U.S. 602 (1971), continues to set forth the applicable constitutional standard for assessing the validity of governmental actions challenged under the Establishment Clause." Vasquez v. Los Angeles County, 487 F.3d 1246, 1254 (9th Cir. 2007) (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) (noting the Lemon test's "checkered career in the decisional law of [the Supreme Court]"). The "Lemon test" is appropriate to apply to plaintiff's Establishment Clause claim because it "accommodates the analysis of a claim brought under a hostility to religion theory." Am. Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1121 (9th Cir. 2002). Under the Lemon test, a government act is consistent with the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disproves of religion; and (3) does not foster excessive governmental entanglement with religion. See Lemon, 403 U.S. at 612-13; Vasquez, 487 F.3d at 1255.

Under the first part of the Lemon test, the Court determines whether defendant's act of prohibiting "Ave Maria" was grounded in a secular purpose. "Governmental actions taken to avoid potential Establishment Clause violations have a valid secular purpose under Lemon." Vasquez, 487 F.3d at 1255 (emphasis added). This rule makes sense because "Establishment

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<sup>18</sup> In a footnote, plaintiff suggests that defendant's alleged hostility toward the performance of "Ave Maria" was the result of defendant's religious beliefs. See Dkt. #17 n.5. Also in a footnote, defendant moves to strike this reference. See Dkt. #27 at n.9. The Court denies the motion to strike as moot because "deletion or retention of the material would in no way affect the outcome of this case." In re Roosevelt, 220 F.3d 1032, 1040 n.15 (9th Cir. 2000).



1 Clause jurisprudence would be unworkable if it were any other way: ‘For this court . . . to hold  
 2 that the removal of . . . objects to cure an Establishment Clause violation would itself violate the  
 3 Establishment Clause would . . . result in an inability to cure an Establishment Clause violation  
 4 and thus totally eviscerate the [E]stablishment Clause.’ Id. at 1256 n.8 (quoting McGinley v.  
 5 Houston, 282 F. Supp. 2d 1304, 1307 (M.D. Ala. 2003), aff’d, 361 F.3d 1328 (11th Cir. 2004)  
 6 (ellipsis and alterations in original)). The Court finds that defendant’s action was motivated by  
 7 an effort to avoid a potential Establishment Clause violation. See Dkt. #9, Ex. 2 (Whitehead  
 8 Dep.) at 34:18-20 (Q. Where did you obtain your information that the commencement was  
 9 required to be a neutral setting? A. From the Supreme Court decision about commencement  
 10 [Lee v. Weisman, 505 U.S. 577 (1992)].”); Dkt. #10 (Brandsma Decl.) at ¶6 (stating that the  
 11 purpose of the June 2006 e-mail was to provide “information why religion had to [be] kept out  
 12 of graduation.”); see also section II.B.2.b, infra. Therefore, defendant’s action satisfies the first  
 13 part of Lemon’s test.

14 The Lemon test’s second part prohibits government action that has the “principal or  
 15 primary effect” of advancing or disapproving religion. See Lemon, 403 U.S. at 612; Am. Family  
 16 Ass’n, Inc., 277 F.3d at 1122. The Ninth Circuit has “noted that ‘because it is far more typical  
 17 for an Establishment Clause case to challenge instances in which the government has done  
 18 something that favors religion or a particular religious group, [there is] little guidance  
 19 concerning what constitutes a primary effect of inhibiting religion.’” Vasquez, 487 F.3d at 1256  
 20 (quoting Am. Family Ass’n, Inc., 277 F.3d at 1122). In Vasquez, the Ninth Circuit held that an  
 21 action does not violate the second part of the Lemon test if the action “could not ‘reasonably be  
 22 construed to send as its primary message the disapproval of plaintiff’s religious beliefs.” Id. at  
 23 1257 (quoting Vernon v. City of Los Angeles, 27 F.3d 1385, 1399 (9th Cir. 1994) (emphasis in  
 24 original, alteration omitted)). Like in Vasquez, the Court here finds that a “reasonable observer”

25 familiar with the history and controversy surrounding religious speech at graduation exercises

1 would not perceive the primary effect of defendant's action as one of hostility toward religion.  
 2 "Rather, it would be viewed as an effort by Defendant[] to comply with the Establishment  
 3 Clause and to avoid unwanted future litigation." Id. at 1257; see Dkt. #10 (Brandsma Decl.) at  
 4 ¶4 (describing the "complaints from those in attendance and letters to the editor [that] appeared  
 5 in the Everett Herald (Snohomish County's largest newspaper) as a result of the religious music  
 6 ["Up Above My Head"] that was performed at the 2005 graduation."); id. at Ex. 5 (JHS 2005  
 7 graduation program listing performance of "Up Above My Head"); Dkt. #9, Ex. 4 (Everett  
 8 Herald June 26, 2005 letter to the editor from a concerned citizen titled Religious song had no  
 9 place at event).

10 Finally, the last part of the Lemon test prohibits government action that fosters "excessive  
 11 government entanglement with religion." See Lemon, 403 U.S. at 613. In her response, plaintiff  
 12 did not articulate how defendant's action caused excessive entanglement with religion. See Dkt.  
 13 #25. Additionally, given plaintiff's stance on the lack of religious content of "Ave Maria," the  
 14 Court finds that plaintiff cannot show that excessive entanglement occurred. Plaintiff's  
 15 Establishment Clause claim is premised on the fact that the government may not exhibit a  
 16 hostility toward religion. The claim might be stronger if plaintiff believed that the performance  
 17 of Biebl's "Ave Maria" conveyed a religious message. But, she does not. In plaintiff's  
 18 declaration in support of her Cross-Motion, she states: "The other seniors and I did not choose  
 19 the 'Ave Maria' piece because of any religious message it might convey. Rather, the seniors  
 20 chose it because of its beauty, we liked how it sounded and the performance would have made  
 21 our graduation a memorable one." See Dkt. #18 (Nurre Decl.) at ¶¶17-18. Based on this,  
 22 plaintiff cannot take the position that defendant acted with hostility toward religion or the  
 23 School District's action fostered "excessive entanglement with religion" when plaintiff does not  
 24 assert that the speech that was excluded conveyed a religious message. Therefore, under  
 25 Lemon, defendant is entitled to summary judgment on plaintiff's Establishment Clause claim.

1                                   **(iii). Equal Protection**

2           Finally, in her Complaint plaintiff alleges that “Defendant Whitehead’s decision to forbid  
3 the Plaintiff and other senior members of the high school wind ensemble from performing  
4 Biebl’s ‘Ave Maria’ at the high school graduation ceremony . . . deprives the Plaintiff and the  
5 other senior wind ensemble members of equal protection of the law guaranteed by the  
6 Fourteenth Amendment to the United States [Constitution].” Dkt. #1 at ¶32. In her Complaint,  
7 however, plaintiff does not articulate how or why defendant’s action was a violation of  
8 plaintiff’s equal protection rights.

9           In considering a challenge under the Equal Protection Clause, the Court must first  
10 determine what level of scrutiny to apply “depending upon the interest affected or the  
11 classification involved.” Dunn v. Blumstein, 405 U.S. 330, 335 (1972). The Supreme Court has  
12 “repeatedly held that a classification neither involving fundamental rights nor proceeding along  
13 suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship  
14 between disparity of treatment and some legitimate governmental purpose.” Central State Univ.  
15 v. Am. Ass’n of Univ. Professors, 526 U.S. 124, 128 (1999) (quotation marks, citation, and  
16 alteration omitted); Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of  
17 Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000) (“To withstand Fourteenth Amendment  
18 scrutiny, a statute is required to bear only a rational relationship to a legitimate state interest,  
19 unless it makes a suspect classification or implicates a fundamental right.”) (citing City of New  
20 Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curium) (equal protection).

21           Plaintiff clarifies her equal protection theory in her response to defendant’s motion for  
22 summary judgment where she states: “Nurre and her Wind Ensemble classmates were singled  
23 out for different treatment because, unlike previous senior classes, their choice of a performance  
24 piece at graduation was not allowed. This different treatment was not reasonable or  
25 rational[.]”. Dkt. #25 at 22-23. In support of this theory, plaintiff relies on the Supreme

1 Court's "class of one" equal protection jurisprudence, quoting Village of Willowbrook v. Olech,  
 2 528 U.S. 562 (2000), where the Supreme Court stated:

3 Our cases have recognized successful equal protection claims brought by a 'class  
 4 of one,' where the plaintiff alleges that she has been intentionally treated  
 5 differently from others similarly situated and that there is no rational basis for the  
 6 difference in treatment. In so doing, we have explained that the purpose of the  
 7 equal protection clause of the Fourteenth Amendment is to secure every person  
 8 within the State's jurisdiction against intentional and arbitrary discrimination,  
 9 whether occasioned by express terms of a statute or by its improper execution  
 10 through duly constituted agents.

11 Id. at 564-65 (internal citations and quotation marks omitted, emphasis added); Dkt. #25 at 22.

12 Accordingly, in assessing plaintiff's Equal Protection claim, the Court applies a rational  
 13 basis standard of review because plaintiff has not shown that: (1) the defendant deprived  
 14 plaintiff of a fundamental right,<sup>19</sup> or (2) the alleged classification proceeded "along suspect  
 15 lines." Instead, plaintiff bases her Equal Protection claim on the "class of one" theory, which  
 16 requires only rational basis review.

17 As discussed above in Section II.B.2.a.(ii) and below in Section II.B.2.b, given the School  
 18 District's Establishment Clause concerns over the performance of "Ave Maria" at the graduation  
 19 ceremony, the Court finds that defendant had a rational basis for treating the 2006 Wind  
 20 Ensemble's selection of "Ave Maria" differently from the 2003-2005 Wind Ensemble's  
 21 selection of David Holisnger's "On a Hymnsong of Philip Bliss." See Dkt. #10, Ex. 5 (2005  
 22 JHS graduation program); Dkt. #9, Ex. 3 (Moffat Dep.) at 31:22-33:4. Therefore, the Court  
 23 concludes that defendant did not violate plaintiff's equal protection rights and grants defendant's  
 24 motion for summary judgment on this claim.

#### 25 **b. Whether the rights were clearly established**

26 Although the Court's conclusion above that plaintiff's constitutional rights were not

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<sup>19</sup> Plaintiff has not identified any authority where the right to play "beautiful music" has been held  
 to be "fundamental."

1 violated entitles Dr. Whitehead to qualified immunity as an individual defendant, for the record,  
 2 the Court also grants defendant's motion for summary judgment on qualified immunity for the  
 3 separate reason that it was not clearly established that defendant's actions were unlawful. See  
 4 Saucier, 533 U.S. at 201 ("If no constitutional right would have been violated were the  
 5 allegations established, there is no necessity for further inquires concerning qualified  
 6 immunity."). "The Supreme Court has provided little guidance as to where courts should look to  
 7 determine whether a right was clearly established at the time of the injury." Boyd v. Benton  
 8 County, 374 F.3d 773, 781 (9th Cir. 2004). In the Ninth Circuit, the Court first looks to binding  
 9 precedent by the Supreme Court or this Circuit to determine whether a right was clearly  
 10 established. Id. In the absence of binding precedent, the Court is instructed to "look to  
 11 whatever decisional law is available to ascertain whether the law is clearly established' for  
 12 qualified immunity purposes, 'including decisions of state courts, other circuits, and district  
 13 courts.'" Id. (citing Drummond v. City of Anaheim, 343 F.3d 1052, 1060 (9th Cir. 2003)).

14 Qualified immunity protects "all but the plainly incompetent or those who knowingly  
 15 violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). "A reasonable belief that the  
 16 conduct was lawful is sufficient to secure qualified immunity." McDade v. West, 223 F.3d  
 17 1135, 1142 (9th Cir. 2000) (citation omitted). This case implicates the difficult intersection of  
 18 the First Amendment's Free Speech and Establishment Clauses. "That the Constitution requires  
 19 toleration of speech over its suppression is no less true in our Nation's schools. But the  
 20 Constitution also demands that the State not take action that has the primary effect of advancing  
 21 religion. The introduction of religious speech into the public schools reveals the tension  
 22 between these two constitutional commitments, because the failure of a school to stand apart  
 23 from religious speech can convey a message that the school endorses rather than merely tolerates  
 24 that speech." Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 263-64  
 25 (1990) (Marshall, J., concurring) (internal citations omitted). Recognizing this tension, the

Supreme Court “suggested in Widmar v. Vincent, 454 U.S. 263, 271 (1981), that the interest of the State in avoiding an Establishment Clause violation ‘may be [a] compelling’ one justifying an abridgment of free speech otherwise protected by the First Amendment.” Lamb’s Chapel, 508 U.S. at 394. Later, in Good News Club v. Milford Central Sch., 533 U.S. 98, 113 (2001), the Supreme Court stated “it is not clear whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.” Id. (emphasis added) (citing Lamb’s Chapel, 508 U.S. at 394-95 (noting the suggestion in Widmar but ultimately not finding an Establishment Clause problem)). In both Good News Club and Lamb’s Chapel, the Supreme Court did not reach the issue of the government’s interest in avoiding an Establishment Clause violation because under the facts of these two cases, “‘there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed.’” Good News Club, 533 U.S. at 113 (quoting Lamb’s Chapel, 508 U.S. at 395). In Good News Club, the Court reasoned that “[b]ecause Milford [the School District] has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford’s viewpoint discrimination.” Id. at 120.

As a result, “[t]he Supreme Court observe[d] in Good News Club that the question ‘whether a State’s interest in avoiding an Establishment Clause violation would justify viewpoint discrimination’ is an open one.” Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1053 n.7 (9th Cir. 2003) (quoting Good News Club, 533 U.S. at 113). The question, however, is not an open one in the Ninth Circuit. Id. The Ninth Circuit has “recognized that Establishment Clause concerns can justify speech restrictions ‘in order to avoid the appearance of government sponsorship of religion.’” Hills, 329 F.3d at 1053 (quoting Lassonde, 320 F.3d at 983-85; citing Cole, 228 F.3d at 1103-05, and Prince v. Jacoby, 303 F.3d 1074, 1082 (9th Cir. 2002)). This line of jurisprudence has been loosely referred to as the “Establishment Clause defense.” See

1 Hills, 329 F.3d 1053.<sup>20</sup>

2 In this case, given the graduation context, the Wind Ensemble's performance of "Ave  
3 Maria" would have appeared to be the School District's speech not the "private speech" of the  
4 plaintiff or the Wind Ensemble. See Hazelwood v. Kuhlmeier, 484 U.S. 260, 271 (1988)  
5 (discussing in the free speech context the control over "expressive activities that students,  
6 parents, and members of the public might reasonably believe to bear the imprimatur of the  
7 school"). Although plaintiff asserts that graduation is not a "magic" setting, both the Supreme  
8 Court and the Ninth Circuit have underscored the significance of the graduation context. See  
9 Dkt. #29 at 10 ("[T]here is nothing magic about graduation ceremonies[.]"). In Lee v. Weisman,  
10 505 U.S. 577, 597 (1992), the Supreme Court noted that "[a]t a high school graduation, teachers  
11 and principals must and do retain a high degree of control over the precise contents of the  
12 program, the speeches, the timing, the movements, the dress, and the decorum of the students."  
13 Given this control over graduation, the Ninth Circuit has concluded that: "the essence of  
14 graduation is to place the school's imprimatur on the ceremony – including the student speakers  
15 that the school selected." Lassonde, 320 F.3d at 985. In this unique context, the Ninth Circuit  
16 concluded in Cole that "the District's plenary control over the graduation ceremony, especially  
17 the student speech, makes it apparent [that the sectarian] speech would have borne the imprint of  
18 the District." Cole, 228 F.3d at 1103. Therefore, speech at graduation may be considered state-

19 \_\_\_\_\_  
20 <sup>20</sup> "Establishment Clause defense" jurisprudence in the Ninth Circuit suggests that the "defense"  
21 does not apply unless the school district proves that the Establishment Clause would have been violated  
22 had the activity at issue been allowed to proceed. See Hills, 329 F.3d at 1053 ("The District has not,  
23 however, demonstrated that the Establishment Clause would be violated if it permitted distribution of  
24 literature that advertised religious programs or events."); Cole, 228 F.3d at 1102 ("[I]t is clear the  
25 District's refusal to allow Cole to deliver a sectarian invocation as part of the graduation ceremony was  
26 necessary to avoid an Establishment Clause violation."). If the Establishment Clause "defense" is to  
provide any meaningful shelter for a school district, however, the defense should not depend on a  
hindsight determination by the court, but rather on the reasonableness of the school district's belief at the  
time that an activity would violate the Establishment Clause.

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING PLAINTIFF'S CROSS-  
MOTION FOR SUMMARY JUDGMENT



1 sponsored as opposed to “private speech.” See Mergens, 496 U.S. at 250 (“[T]here is a crucial  
 2 difference between government speech endorsing religion, which the Establishment Clause  
 3 forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses  
 4 protect.”).

5 Where speech bears the imprimatur of the school, the school has an interest in avoiding a  
 6 conflict with the Establishment Clause. In Cole, for example, the Ninth Circuit held that the  
 7 “school district had to sensor the [sectarian] speech in order to avoid the appearance of  
 8 government sponsorship of religion,” and because “allowing the speech would have had an  
 9 impermissibly coercive effect on dissenters, requiring them to participate in a religious practice  
 10 even by their silence.” Lassonde, 320 F.3d at 983.

11 In this case, the Court finds that the Wind Ensemble’s performance of “Ave Maria”  
 12 would have borne the imprimatur of the school because the performance took place at  
 13 graduation, the School District exercised control over the performance by placing restrictions on  
 14 its content, and the performance was by the “Jackson Band” as listed in the 2006 JHS graduation  
 15 program.” See Dkt. #10, Ex. 6 (2006 graduation program); Dkt. #12 (Cheshire Decl.) at ¶2  
 16 (“After that graduation [in 2005], it was made clear to me that I was to review all music  
 17 selections, especially in connection with commencement ceremony.”). Given the graduation  
 18 context in this case, the facts here are distinguishable in a “fair way” from the Supreme Court’s  
 19 “equal access” cases in Widmar, Good News Club, and Lamb’s Chapel because in those cases  
 20 the Court held that there was no realistic danger that the community would think that the district  
 21 was endorsing the activity. See Lamb’s Chapel, 508 U.S. at 395; Saucier, 533 U.S. at 202-03.

22 As the Court found above, defendant’s purpose in restricting the speech was to avoid a  
 23 conflict with the Establishment Clause. See Section II.B.2.a.(ii), supra. Given the Ninth  
 24 Circuit’s precedent in Cole and Lassonde, and in light of the district’s Establishment Clause  
 25 concerns, the Court cannot say that the contours of plaintiff’s rights in the context of a

1 graduation ceremony were “sufficiently clear” that defendant would understand that by  
 2 prohibiting the performance of “Ave Maria” defendant was knowingly violating the law. See  
 3 Saucier, 533 U.S. at 202 (“The contours of the right must be sufficiently clear that a reasonable  
 4 official would understand that what he is doing violates that right.”). To be sure, the  
 5 Establishment Clause conflict was much greater with the proselytizing speeches in Cole and  
 6 Lassonde. See Lassonde, 320 F.3d at 983. But, the Supreme Court has stated that “[t]he  
 7 Establishment Clause proscribes public schools from ‘conveying or attempting to convey a  
 8 message that religion or a particular religious belief is favored or preferred[.]’”). Lee, 505 U.S.  
 9 at 604-05 (Blackmun, J., concurring) (emphasis in original) (quoting County of Allegheny v.  
 10 ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593 (1989)). Here, while plaintiff asserts  
 11 “that there was no reasonable basis for forbidding the Wind Ensemble to perform ‘Ave Maria’”  
 12 the Court concludes that defendant’s prohibition was not clearly unlawful given the hazy border  
 13 between the Establishment Clause and Free Speech Clause in the high school graduation  
 14 context.<sup>21</sup> See Cross-Motion at 13. In cases like this one, school administrators run the risk of  
 15 being whipsawed by the First Amendment’s Free Speech and Establishment Clauses. See, e.g.,  
 16 Dkt. #10 (Brandsma Decl.) at ¶4 (describing the complaints from the performance of “Up Above  
 17 My Head”). “School [superintendents] have a difficult job” and “the law should not demand  
 18 that they fully understand the intricacies of [the Supreme Court’s] First Amendment  
 19 jurisprudence.” Morse, 127 S. Ct. at 2629, 2639 (Breyer, J., concurring in the judgment in part  
 20

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21 <sup>21</sup> Under the forum analysis, restricting the religious subject matter on Establishment Clause  
 22 grounds was reasonable in light of the graduation context. See DiLoreto, 196 F.3d at 967 (“In a  
 23 nonpublic forum opened for a limited purpose, restrictions on access ‘can be based on subject matter . . .  
 24 so long as the distinctions drawn are reasonable in light of the purpose served by [the] forum’ and the  
 25 surrounding circumstances.”) (quoting Cornelius, 473 U.S. at 806, 809)); Glover, 480 F.3d at 920 (“We  
 26 see nothing wrong with the County excluding certain subject matter or activities that it deems  
 inconsistent with the forum’s purpose, so long as the County does not discriminate against a speaker’s  
 viewpoint.”).

1 and dissenting in part). Therefore, the Court cannot say that defendant was “plainly  
 2 incompetent” or “knowingly violate[d] the law” by assuming that her actions restricting “Ave  
 3 Maria” were proper under the Establishment Clause. See Malley, 475 U.S. at 341. For this  
 4 reason, the Court concludes that defendant as an individual is entitled to qualified immunity on  
 5 plaintiff’s free speech claim. Similarly, the Court concludes that defendant is entitled to  
 6 qualified immunity on plaintiff’s Establishment Clause claim because the Court has been unable  
 7 to find authority clearly establishing that defendant was acting with hostility toward religion in  
 8 violation of the Establishment Clause by prohibiting the performance of “Ave Maria” at a  
 9 graduation ceremony. Plaintiff’s reliance on the out-of-circuit authority of Stratechuk v. Bd. of  
 10 Educ. of S. Orange-Maplewood Sch. Dist., 200 Fed. Appx. 91 (3d Cir. 2006), Doe v.  
 11 Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995), and Bauchman v. West High Sch.,  
 12 132 F.3d 542 (10th Cir. 1997) is unavailing. See Dkt. #25 at 18-23. First, not only is Stratechuk  
 13 unpublished, but it also addressed a motion to dismiss for failure to state a claim. Stratechuk,  
 14 200 Fed. Appx. at 94. In reversing the district court, the Third Circuit simply held that a claim  
 15 alleging that “a categorical ban on exclusively religious music, enacted with the express purpose  
 16 of sending a message of disapproval of religion,” was not subject to dismissal on a Fed. R. Civ.  
 17 P. 12(b)(6) motion. Id. Duncanville is also distinguishable here because, on a motion for an  
 18 injunction, the case addressed the issue of whether vocal performances of the choral song “The  
 19 Lord Bless You and Keep You” at choir performances constituted impermissible endorsement of  
 20 religion. Duncanville Indep. Sch. Dist., 70 F.3d at 407. The holding of Duncanville did not  
 21 concern a “hostility to religion” claim like the one asserted by plaintiff in this case, and also  
 22 Duncanville addressed the use of the music as a school chorus’ “theme” song – it did not  
 23 consider a performance of the song in the graduation context. Id. Notably, the Wind Ensemble  
 24 here was allowed to perform “Ave Maria” at a music concert. See Dkt. #19, Ex. A (Moffat  
 25 Dep.) at 36:14-23. The specific prohibition in this case occurred in the graduation context.

1 Similarly, in Bauchman, the Tenth Circuit did not consider a hostility toward religion  
2 Establishment Clause claim or address the graduation context. Bauchman, 132 F.3d at 548, 550  
3 (dismissing as moot appeal No. 95-4084 concerning the choir's performance at graduation).  
4 Significantly in Bauchman, the Tenth Circuit prohibited the choir's performance of "The Lord  
5 Bless You and Keep You" and "Friends" at the 1995 graduation ceremony pending appeal. Id.  
6 at 547 n.4 ("Ms. Bauchman also requested an injunction pending appeal, which we granted,  
7 thereby enjoining the singing of two songs, "The Lord Bless You and Keep You" and "Friends,"  
8 by the Choir at West High School's 1995 graduation ceremonies.") (emphasis added).

9 Similarly, under rational basis scrutiny, the Court also concludes that plaintiff is entitled  
10 to qualified immunity on plaintiff's Equal Protection claim because there is no clearly  
11 established authority holding that the Supreme Court's "class of one" jurisprudence applies to  
12 the context of this case. To the contrary, the Ninth Circuit has previously suggested in its Equal  
13 Protection jurisprudence that "trying to avoid establishment clause problems" is a "legitimate  
14 purpose" so long as the action taken rationally furthers that purpose. See Christian Science  
15 Reading Room Jointly Maintained v. City & County of San Francisco, 784 F.2d 1010, 1013 (9th  
16 Cir. 1986) (holding, however, that the action taken did not rationally further the purpose of  
17 remedying an Establishment Clause violation), rehearing en banc denied, 807 F.2d 1466, 1468  
18 n.2 (9th Cir. 1987) (stating that "[t]he panel conceded that trying to avoid establishment clause  
19 problems was a legitimate purpose.") (Norris, J., dissenting). In this case, the Court finds that  
20 defendant's action was rational and furthered the purpose of avoiding Establishment Clause  
21 problems where the performance of "Ave Maria" would have borne the School District's  
22 imprimatur at the 2006 JHS graduation ceremony. As the Supreme Court has emphasized,  
23 "[e]veryone knows that in our society and in our culture high school graduation is one of life's  
24 most significant occasions. . . . Graduation is a time for family and those closest to the student  
25

1 to celebrate success and express mutual wishes of gratitude and respect[.]” Lee, 505 U.S. at  
 2 595. In light of the significance of graduation, it is rational that school administrators would  
 3 strive to avoid things that offend in order to structure a ceremony for all students and families.

### 4 **3. Municipal liability**

5 Plaintiff’s complaint under 28 U.S.C. § 1983 is against defendant Dr. Carol Whitehead as  
 6 both an “individual” and in her “official capacity as the Superintendent of Everett School  
 7 District No. 2.” See Dkt. #1. Both parties agree that suing defendant in her “official capacity”  
 8 is functionally equivalent to a claim against the Everett School District. See Dkt. #25 at 5 (“The  
 9 claim against the Defendant in her official capacity is the functional equivalent of a claim  
 10 against the School District[.]”); Dkt. #32 at 2 (“Dr. Whitehead does not dispute that the suit  
 11 against her in her official capacity is, in reality, a suit against the Everett School District.”);  
 12 Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991) (“A suit against a governmental  
 13 officer in his official capacity is equivalent to a suit against the governmental entity itself.”).

14 In order for plaintiff to support a municipal liability claim against defendant under §  
 15 1983, however, plaintiff must establish that she was denied a constitutional right. See Miller v.  
 16 Cal. Dep’t of Soc. Serv., 355 F.3d 1172, 1176-77 (9th Cir. 2004) (“Because [plaintiffs] have  
 17 failed to establish a constitutional right of which they were deprived, the district court properly  
 18 determined that the [plaintiffs] established no claim against Yuba County.”) (citing Van Ort v.  
 19 Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996)); see also Oviatt v. Pearce, 954 F.2d 1470,  
 20 1474 (9th Cir. 1991) (“To impose liability on a local governmental entity for failing to act to  
 21 preserve constitutional rights, a section 1983 plaintiff must establish: (1) that he possessed a  
 22 constitutional right of which he was deprived[.]”) (citing City of Canton v. Harris, 489 U.S. 378,  
 23 389-91 (1989)). Given the Court’s conclusion above in Section II.B.2.a that plaintiff was not  
 24 deprived of a constitutional right, the Court grants defendant’s motion for summary judgment on  
 25

1 all claims against the Everett School District.<sup>22</sup>

2 **III. CONCLUSION**

3 For all of the foregoing reasons, “Defendant’s Motion for Summary Judgment” (Dkt. #8)  
4 is GRANTED and “Plaintiff Nurre’s Motion for Summary Judgment Under CR 56(A)” (Dkt.  
5 #17) is DENIED.

6  
7 DATED this 20th day of September, 2007.

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9 Robert S. Lasnik  
10 United States District Judge  
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23 <sup>22</sup> For this reason, the Court does not need to reach the issue of whether defendant had the “final  
24 policy making authority” necessary to subject the School District to liability under 28 U.S.C. § 1983. See  
25 City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion) (“[O]nly those municipal  
26 officials who have ‘final policymaking authority’ may by their actions subject the government to § 1983  
liability.”); Dkt. #34 (Order Requesting Supplemental Briefing).